NO. 76-1143

In the Supreme Court of the United States

OCTOBER TERM, 1977

RAY MARSHALL,
Secretary of Labor, et al.,
Appellants

v.

BARLOWS, INC.,
Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF IDAHO

BRIEF AMICUS CURIAE ON BEHALF OF THE STATES OF IDAHO AND UTAH IN SUPPORT OF THE APPELLEE

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INDEX

CITATIONS

Cases:

CONSTITUTIONS, STATUTES AND REGULATIONS

MISCELLANEOUS

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QUESTIONS PRESENTED

Whether the Fourth Amendment to the United States Constitution bars authorized representatives of the Secretary of Labor from conducting non-consentual inspections of any business affecting interstate commerce without probable cause and without a warrant pursuant to the Occupational Safety and Health Act of 1970, 29 U.S.C.A. §657(a).

INTEREST OF AMICUS CURIAE

The Occupational Safety and Health Act of 1970, 29 U.S.C.A. §651, *et seq.* is a comprehensive attempt by Congress to reduce safety and health hazards for employees working in any business or enterprise which affects interstate commerce. Pursuant to 29 U.S.C.A. §667, States may assume responsibility for development and enforcement of standards designed to accomplish the laudable goals of the Act. However, no State plan may be approved pursuant to that statutory provision unless the plan, in effect, contains requirements for warrantless inspections such as those found in §657 of the Act. Due to these requirements for approval of State plans, States must elect either (1) to bow to the requirements for inspections in order to be allowed the right to assume responsibility for development and enforcement of safety and health standards or (2) to allow federal enforcement and development of standards, thereby giving up legitimate control and sanctioning the dangerous precedent and constitutional infirmities created in the Act through warrantless searches of business premises without probable cause. An affirmation of the holding of the three-judge federal panel below would allow any interested State to develop and enforce health and safety standards for industry within the parameters of constitutional guarantees.

ARGUMENT

The Occupational Safety and Health Act of 1970, 29 U.S.C.A. §651, *et seq.* (hereinafter referred to as OSHA) is a legislative attempt to improve the working environment for millions of Americans. The valid far-reaching goals apply to all business activity having an affect on interstate commerce. Approximately five million businesses and sixty million employees fall within the reach of this extensive legislation. Robbins, *Truth and Rumor About OSHA*, 33 Fed. B.J. 149, 149 (1974).[1]

Since public health and safety is the raison d'etre for OSHA, Congress wisely recognized the need for state involvement. Under 29 U.S.C.A. §§651(b) (11) and 667, States are encouraged to assume full responsibility for their health and safety laws, including development and enforcement of federal occupational standards. This authority is conditioned, however, on compliance with certain criteria. In short, a State may avoid to some extent federal preemption in the field of occupational hazards by adopting a plan which strictly adheres to the requirements listed in OSHA. A State failing to meet all of the listed requirements, or choosing not to do so, loses its authority as the prime mover in the field of occupational safety. For this reason, the requirements which must be met by each State are extremely significant because the State, in preparing an appropriate plan, must adopt as its own the requirements listed in 29 U.S.C.A. §667. The major §667 stumbling block for the States, resulting in a practice held unconstitutional on its face or as applied, is §667(c) (3), providing as follows:

> "The secretary [of labor] shall approve the plan submitted by a state under subsection (b) of this section, or any modification thereof, if such plan in his judgment —
> (3) provides for a right of entry and inspection of all workplaces subject to this chapter which is at least as effective as that provided in §657 of this Title, and includes a prohibition on advance notice of inspections ..."

Section 657, referred to in the quote, appears to allow inspections of private premises without probable cause or need for a warrant. The three-judge federal panel below held such a

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[1]Statistics reflect, in fact, that over eighty percent (80%) of the nation's work force are covered by the Act. Shaffer, Job Health and Safety, 1976 Editorial Research Reports 953, 963.

practice unconstitutional. If such be the case, and we believe that it is, States, in order to assume control of occupational hazards within their borders, must subscribe to the unconstitutional inspection requirement contained in OSHA. States, therefore, are on the horns of a dilemma. They must either relinquish control of their occupational hazard programs to the federal government or adopt and enforce a warrantless inspection requirement violating the Fourth Amendment to the United States Constitution.

I.

SECTION 8(a) OF OSHA, 29 U.S.C.A. §657 (a) REQUIRES INSPECTION OF PRIVATE PREMISES WITHOUT THE NEED FOR A WARRANT OR EVEN PROBABLE CAUSE AND VIOLATES, THEREFORE, THE GUARANTEES OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

The Fourth Amendment to the United States Constitution concisely states:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Armed with the guarantees within the Fourth Amendment, citizens may rest secure (1) that they will not be subjected to unreasonable searches or seizures, and (2) that a warrant shall never issue except on probable cause, and (3) that, with certain narrow exceptions, no search or seizure shall take place without a warrant. Administrative inspections, which have grown considerably in recent years, fall within the purview of fourth amendment guarantees. Courts have long recognized the legitimate role played by administrative in-

spections in protection of the public interest. In balancing this interest with individual freedom against unreasonable searches and seizures, this Court has through several decisions interpreted the fourth amendment limits for administrative inspections. Section 8(a) of OSHA extends beyond the boundaries established by this Court.

OSHA administrative inspections are provided for as follows:

> "In order to carry out the purposes of this chapter, the secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —
> (1) to enter without delay and at reasonable times any factory, plant, establishment, construction site, or other area, work place or environment where work is performed by an employee of an employer; and
> (2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable limits and in a reasonable manner any such place of employment and all pertinent conditions, structures, machines, apparatus, devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee." 29 U.S.C.A. §657(a).

Congress liberally included the word "reasonable" throughout §657. However, this alone is far from enough. Numerous factors are involved in determining reasonableness of a search. Reasonableness triggers the probable cause needed for the search and, with certain narrow exceptions, a warrant must first be obtained.

The three-judge federal panel below concluded (1) that the language of §657 allows routine warrantless searches of private business premises without probable cause and (2) that the procedure violated the Fourth Amendment to the United States Constitution. This Court is urged to uphold the decision below.

At the outset, it is important to recall that the fourth amendment guarantees apply to commercial property as

well as to individual dwellings. See, *e.g. See v. City of Seattle*, 387 U.S. 541 (1967), *Go-Bart Company v. United States*, 282 U.S. 334 (1931), and *Silverthorne Lumber Company v. United States*, 251 U.S 385 (1920). Administrative searches of commercial property as well as individual dwellings have been before this Court.

In 1967, the parameters for administrative searches under the fourth amendment were considered in two companion cases. *Camara v. Municipal Court*, 387 U.S. 523 (1967) and *See v. Seattle, supra.* In *Camara*, the Court considered an administrative search of a private dwelling pursuant to a city building code. The question at issue was whether an administrative search could occur without a warrant. The Court observed initially that "(i)t has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the reasonable confines of a reasonable search warrant requirement" 387 U.S. at 533, and went on to state:

> "In summary, we hold that administrative searches of the kind at issue here are significant intrusions upon the interests protected by the fourth amendment, that such searches when authorized and conducted without a warrant procedure lack the traditional safeguards which the fourth amendment guarantees to the individual, and that the reason put forth in *Frank v. Maryland* and in other cases for upholding these warrantless searches are insufficient to justify so substantial a weakening of the fourth amendment's protection." 387 U.S. at 534.

Therefore, this Court held that a warrant requirement exists for administrative inspections. However, in so holding, the Court emphasized that such inspections may proceed on probable cause of a different nature than that required within the criminal law:

> "Having concluded that the area inspection is a 'reasonable' search of private property within the meaning of the fourth amendment, it is obvious that 'probable cause' to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal programs being enforced, may be based upon the passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. It has been suggested that so to vary the probable cause test from the standard applied in criminal cases would be to authorize a 'synthetic search warrant' and thereby to lessen the overall protections of the fourth amendment. But we do not agree. The warrant procedure is designed to guarantee that a decision to search private property is justified by a reasonable governmental interest. But reasonableness is still the ultimate standard." 387 U.S. at 538.

The *Camara* reasoning was carried over to commercial business premises in *See v. Seattle, supra.* In that decision, the Court said:

> "The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 543.

Analysis of these two cases reveals that in all private premises, including commercial business, administrative inspections may occur only on probable cause and pursuant to a warrant, absent the type of defined situations such as exigent circumstances that would negate need for a warrant. Probable cause is determined by reasonableness of the search, and administrative probable cause is somewhat different from that needed for a warrant under criminal law. Still, probable cause is the test, and a warrant is normally required. If the agency involved can call forth legislative and

administrative authority for inspections of private property, and can demonstrate to a judicial officer that the search intended is reasonable, probable cause exists and a valid warrant may issue.

Following the decisions in *Camara* and *See*, this Court further considered warrantless searches in the administrative arena. In *Colonnade Catering Corporation v. United States*, 397 U.S. 72 (1970), a narrow exception to the warrant requirement was carved out for business activities proceeding under a license. In *Colonnade*, a federal liquor license was involved, and the Court reasoned that, given a federal license, there was implied consent to the search. However, the Court was careful to point out that the rationale of *Camara* and *See* still applied and warrantless administrative inspections or searches would be countenanced only in certain instances. Implied consent through a federal license, the Court felt, justified an exception.[2]

In *United States v. Biswell*, 406 U.S. 311 (1972), an administrative search was again before the Court. The case involved a firearms dealer, heavily regulated under federal law.[3] The Court carved out a second exception to the warrant requirement for administrative searches — pervasively regulated business. Quoting from the opinion:

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[2]It is worth noting, also, that the Court in *Colonnade* was dealing with a potentially dangerous product in the channels of commerce. Obviously, the public has an interest in being assured that only properly licensed liquor is distributed due to the detrimental and deleterious effects emanating from unlicensed liquor. *Colonnade* involved a dealer, not a manufacturer. Therefore, given the distribution of a potentially dangerous product, there was strong reason for subjecting a dealer in this commodity to a standard of implied consent for an inspection of his product.

[3]As in *Colonnade, supra, Biswell* involved a dealer of a commodity which, when distributed, could be used to injure and kill. Again, there was abundant reason to subject such a distributor to the implied consent requirement for an inspection of his product.

> "It is also plain that inspections for compliance with the gun control act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms and ammunition will be subject to effective inspection." 406 U.S. at 316.

By the time *Biswell* was decided, the requirements placed on administrative inspection by the fourth amendment were substantially crystallized. More recent decisions by this Court involving administrative inspections have closely followed the rationale developed in *Camara* and *See*. The relationship of such inspection to the fourth amendment is, we believe, as follows:

(1) Absent narrow exceptions, administrative inspections require a valid warrant based on probable cause;

(2) The probable cause needed for administrative searches differs somewhat from the criminal law, requiring instead proper legislative or administrative authority plus other factors showing that the inspections will be reasonable;

(3) The legislative or administrative authority needed for probable cause must be narrowly limited in time, place and scope;

(4) In addition to the exceptions present in the criminal law, such as exigent circumstances and direct consent, exceptions to the warrant requirement will be carefully carved out on a case by case basis; and

(5) The narrow exceptions to date (other than the criminal law exceptions of exigent circumstances, etc.) require evidence of implied consent through participation in a licensed or heavily regulated activity involving a product which, when distributed, could present a serious threat to the public health (liquor) and safety (firearm).

In *Almeida Sanchez v. United States*, 413 U.S. 266 (1973), the Court re-emphasized the holdings in *Camara* and *See*

and found invalid a roving border search of a vehicle by United States Customs Authorities. The Court observed that a relaxed standard of probable cause exists for administrative searches, but again confirmed the need for either consent or a warrant "supported by particular physical and demographic characteristics of the area to be searched." *Almeida Sanchez v. United States*, 413 U.S. 266, 270 (1973). Although *Almeida Sanchez* struck down the roving border search by United States Customs Officials without a warrant, a routine search at a fixed point 66 miles from the Mexican border was considered reasonable in *United States v. Martinez-Fuerte*, 96 S.Ct. 3074 (1976), but significantly, the adherence of *Almeida Sanchez* to the reasoning of *Camara* and *See* was not altered.

In 1974, the Court considered a "smokestack test" taken by an inspector on private business premises. See *Air Pollution Variance Board v. Western Alfalfa Corporation*, 416 U.S 861 (1974). Although the warrantless inspection was upheld under the "open fields" doctrine of search and seizure law, the Court expressly adhered to the pronouncements of *Camara* and *See* insofar as the need for a warrant based on probable cause is concerned.

Finally, in *G.M. Leasing Corporation v. United States*, _____ U.S _____, 97 S. Ct. 619, 50 L. Ed. 2d 530 (1977), the Court found a warrantless search of a business premises by agents of the Internal Revenue Service violative of the fourth amendment. The Court, pointing to *Colonnade* and *Biswell* said:

> "In the present case, however, the intrusion into petitioner's privacy was not based on the nature of its business, its license, or any regulation of its activities. Rather, the intrusion is claimed to be justified on the grounds that petitioner's assets were seizable to satisfy tax assessments. This involves nothing more than the normal enforcement of the tax laws, and we find no justification for treating petitioner differently in these circumstances simply because it is a corporation." 50 L. Ed. 2d at 544.

The constitutionality of §8(a) of OSHA must be viewed against the backdrop provided by these decisions. Considered in this manner, §8(a) falls short of the Fourth Amendment guarantee of the United States Constitution. This Court in *Camara* and *See* recognized the fundamental premise that fourth amendment guarantees apply to administrative inspections. However, as in the criminal law, the Court recognized that certain exceptions to the need for a warrant are necessarily required by the structure of our society. Occasionally, individual freedoms must bow to justifiable protection of governmental interests. Nevertheless, exceptions to the fourth amendment have been sparingly allowed and carefully considered by this Court. In *Colonnade* and *Biswell* the Court allowed an exception when the business to be inspected was proceeding under privilege of a federal license or was one pervasively regulated by the federal government. The theory of those cases is that anyone engaging in business in a heavily regulated area or under privilege of a license recognizes that one of the conditions of such business is periodic inspections by government. This is based, of course, on the doctrine of implied consent.[4] *Colonnade* and *Biswell* are very narrow holdings affecting limited business activity. Certainly, this Court has never taken the position that the protections of the fourth amendment should be completely taken away from owners of business premises.

The approach taken by this Court for administrative inspections, by which only narrow, carefully considered excep-

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[4]Fundamental to this theory, we believe, is the premise that heavily regulated or licensed activity normally involves an enterprise which is — or may become — a threat to public health and safety. The nature of such activity, therefore, requires finding implied consent for governmental inspection.

tions for warrants are allowed, is analagous to the approach taken for searches and seizures under the criminal law. Throughout history, this Court has recognized the importance of the fourth amendment to the fabric of our society. Although exceptions to the fourth amendment are sometimes essential, they are distinctly few in number and are allowed (1) only when there is a public interest strong enough to sanction a temporary loss of constitutional rights *and* (2) only when the rights of the individual are protected to the maximum possible degree.

The few exceptions allowed under the criminal law are well known to this Court. Warrants are not required, for example,

(1) When exigent circumstances require immediate action before a warrant can be obtained (see *e.g. McDonald v. United States,* 335 U.S. 451 (1948), *Adams v. Williams,* 407 U.S. 143 (1972) — establishing identity, *Chimel v. California,* 395 U.S. 752 (1969) — eminent destruction of evidence, *Carroll v. United States,* 267 U.S. 132 (1925) — automobiles and *Cupp v. Murphy,* 412 U.S. 291 (1973) — search incident to lawful arrest for protection of officers and eminent destruction of evidence);

(2) When the individual has consented to a search by police, thus voluntarily waiving fourth amendment guarantees (see *e.g., Scneckloth v. Bustamonte,* 412 U.S. 218 (1973));

(3) When contraband or illegal activity is within the public view (see *e.g. Terry v. Ohio,* 392 U.S. 1 (1968) — plain view and *Hester v. United States* 265 U.S. 57 (1924) — open fields doctrine);

(4) Airport security searches designed to prevent massive destruction of life (see *e.g., United States v. Davis,* 482 F.2d 893 (9th Cir. 1973));

(5) Border searches, designed to prohibit illegal entry of persons and contraband (see *e.g., Boyd v. United States,* 116

U.S. 616 (1886)).

The Courts have jealously guarded fourth amendment freedoms. By so doing the guarantees of the constitution have been kept completely intact. The exceptions allowed to the requirement for a warrant have been pared down to those necessary to maintain adequate flexibility within the constitution. This Court has long recognized that the framework of the fourth amendment must be kept as strong as possible to withstand the winds of tyranny.

As in the area of criminal law, administrative inspections require a warrant from an unbiased judicial official unless a narrowly carved exception appears before the Court. Section 8(a) of OSHA would completely erase this long standing interpretation of the fourth amendment and, instead, we would have a system of government whereby expediency alone would rule. This may be seen from an analysis of the OSHA requirements themselves.

At the present time, OSHA is a blanket covering approximately five million businesses in the United States. Even an enterprise *with one employee* (such as a sidewalk vendor) falls under this expansive law if interstate commerce is affected. See Wander, *Small Business and the Occupational Safety and Health Act of 1970,* Library of Congress Research Service, HD7273 (April 15, 1975). In fact, of the firms subject to OSHA, some ninety percent employ twenty-five employees or less. *Ibid.*

Several Courts already have been confronted with §8(a) of OSHA. Among the reported cases, with one exception, Courts have held that a warrant was required. The case to the contrary is *Brennan v. Buckeye Industries, Inc.,* 374 F. Supp. 1350 (S.D.Ga. 1974). This decision has been criticized by the commentators (see *e.g.,* note, *Brennan v. Buckeye Industries, Inc.: the constitutionality of an OSHA warrantless search,* 1975 *Duke Law Journal* 406), and has not been

followed in subsequent decisions of other Courts.

In *Brennan v. Gibson's Products, Inc. of Plano,* 407 F. Supp. 154 (E.D. Tex. 1976), the district court citing *Camara, See,* and *Almeida Sanchez,* found unconstitutional a warrantless search under OSHA. The Court said that:

> "No emergency existed, and no functional or general equivalent of probable cause such as *Camara* envisions is shown. This warrantless search would not comply with fourth amendment standards and cannot be countenanced." 407 F. Supp. at 162.

However, while finding that a warrantless inspection under OSHA would violate the fourth amendment, the Court went on to read into OSHA a warrant by implication. This resulted from a decision by the Court that since §8(a) of OSHA is silent on the need for a warrant, Congress must necessarily have intended a warrant by implication. This approach was taken also by another three-judge federal panel in New Mexico. *Dunlop v. Hertzler Enterprises, Inc.,* 148 F. Supp. 627 (D.N.M. 1976), held unconstitutional the warrantless searches of OSHA:

> "The Colonnade-Biswell exception is applicable only if certain factors identified by the supreme court are present in a particular case. These factors may be broadly grouped and summarized as follows. First, the enterprise sought to be inspected must be engaged in a pervasively regulated business. The presence of this factor insures that warrantless inspections will pose only a minimal threat to justifiable expectations of privacy. Second, warrantless inspections must be a crucial part of a regulatory scheme designed to further an urgent federal interest. And third, the inspection must be conducted in accord with a statutorily authorized procedure, itself carefully limited as to time, place, and scope." 418 F. Supp. at 631-632.

Like the Court in *Gibson's Products, Inc. of Plano, supra,* the Court in this case found a warrant by implication in §8(a) of OSHA. Therefore, the legislative enactment was saved even though the search in question was found to be unconstitutional because it was made without a warrant.

The three-judge federal panel below took a step in addition to the one taken in *Gibson's Products, Inc. of Plano, supra,* and *Hertzler Enterprises, Inc., supra,* holding that (1) a warrantless administrative inspection with no vestige of probable cause violates the Fourth Amendment to the United States Constitution and (2) §8(a) of OSHA does not impliedly require a warrant but is, as it stands, unconstitutional. The States participating in this Amicus Curiae Brief urge the Court to follow the three-judge federal panel below. Certainly, in light of existing case law and in view of the specific language of the fourth amendment, blanket warrantless inspections with no semblance of probable cause should be held unconstitutional. In addition, however, a reading of a warrant requirement into §8(a) of OSHA through failure of that statute to mention need for a warrant creates a dangerous precedent in statutory construction. When a fundamental right of the constitution is concerned, statutes should be strictly construed and implications should be avoided. Certainty in legislation increases the likelihood for protection of constitutional rights. If Congress indeed intended a warrant requirement under §8(a) of OSHA, it may clearly and simply say so by an amendment to that statute.[5]

II.

THE LENIENT STANDARD OF PROBABLE CAUSE IN ADMINISTRATIVE INSPECTIONS SHOULD NOT APPLY IN THE CASE OF OSHA BECAUSE EVI-

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[5]We agree completely with the Appellant that "nothing in the language of the Act or in its legislative history in any way suggests that the Secretary's Inspectors are required to obtain a search warrant as a pre-requisite to gaining entry to the portion of a regulated business establishment occupied by the employer's work force." Appellant's Brief, page 22.

DENCE GLEANED THROUGH THE INSPECTION MAY RESULT IN CRIMINAL PROSECUTION OF THE OWNER OF THE PREMISES.

States participating in this Brief recognize that the primary reason for administrative inspections pursuant to §8(a) of OSHA is discovery of unsafe or unhealthy working conditions for employees. In addition, penalties for violation of OSHA are primarily civil in character. See 29 U.S.C.A. §666. Such inspections normally give rise to the standard of probable cause established in *Camara* and *See*. As the Court said in *Camara:*

> "Unlike the search pursuant to a criminal investigation, the inspection programs at issue here are aimed at securing city-wide compliance with minimum physical standards for private property. The primary governmental interest at stake is to prevent even the unintentional development of conditions which are hazardous to public health and safety. The court thus recognized the distinction between criminal investigations and those designed to secure healthy and safe conditions pursuant to the public interest." 387 U.S. at 535.

As previously pointed out, §8(a) of OSHA is primarily designed to detect and correct occupational hazards. However, this provision may also be used to conduct a purely criminal investigation. Under §666(g) of OSHA:

> "Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter shall, upon conviction, be punished by fine of not more than $10,000, or by imprisonment for not more than six months, or by both."

The situation could well arise whereby an administrative inspector, armed with information that false statements, representations or certifications have been made on records, reports or other documents maintained at the place of employment or filed with the government, might conduct an

administrative inspection specifically designed to ferret out the truth of the allegations. If so, the inspection would be made exclusively in an attempt to discover criminal violations by the owner of the premises. Evidence obtained for this purpose without a warrant and without probable cause should not be allowed to be used in a criminal trial against the individual.

Of course, the administrative inspector intending to conduct such an inspection could, in that situation, obtain in advance a valid warrant if he had probable cause. But probable cause is the key. When the inspector goes to the premises to seek criminal violation the more strict definition of probable cause applies. This, definitely, should be taken before a magistrate. Also, the inspector should not be allowed the opportunity to gloss over such an inspection by deciding, in his own discretion, that it is primarily civil in nature. This is a job which should be handled by a member of the judiciary.

III.

IF OSHA INSPECTIONS MUST PROCEED PURSUANT TO A WARRANT REQUIREMENT, THIS COURT IS URGED TO SET FORTH STANDARDS WHICH MUST BE MET PRIOR TO ITS ISSUANCE.

The decisions in *Camara* and *See* suggest that probable cause for administrative inspections differs to some degree from criminal law probable cause. Such cause will normally be found if reasonable legislative or administrative standards are present covering the inspection. But, taking an administrative regulation or statute before a judicial officer should not, in itself, establish probable cause. Rather, the official should examine the statutory and administrative standards to determine whether reasonable grounds exist

for the administrative inspection. This Court is urged, therefore, to establish minimum guidelines for probable cause for administrative inspections under OSHA.

Initially, it must be remembered that OSHA applies to all commercial activity affecting interstate commerce. This includes the complete spectrum of industry from the standpoint of danger. A business such as a shoeshine shop may present an extremely limited threat to the employee or employees involved whereas a massive chemical plant may be inherently dangerous to the employees working therein. For this reason, the standard necessary to establish probable cause for an inspection should be higher for those industries not considered inherently or extremely dangerous. This involves, of course, a degree of discretion which could appropriately be applied by a judicial officer. In addition to the distinction between commercial activity from a standpoint of danger, which should be presented to the magistrate by the administrative agency, we urge the Court to require, in addition, at least a showing of the following:

(1) The time since the last inspection of the business premise involved;

(2) The statutory and administrative standards relied on by the government entity;

(3) Whether employees will be interviewed on the job site;

(4)Whether records and other documents will be inspected on the business premises;

(5) Whether the inspection will be limited or general;

(6) Whether the inspection is civil in nature and designed to discover possible unsafe occupational conditions or whether the primary purpose of the inspection is to determine a possible violation subject to criminal prosecution;

(7) Whether the inspection will necessitate downtime within the place of employment during investigation of machinery, devices, etc.;

(8) Whether the inspector has any reason to believe that a violation exists at the job site;

(9) Whether the inspection will necessitate use by the inspector of equipment designed for monitoring or other observation on the premises; and

(10) The time during which the inspection will take place and whether that time coincides with the normal business hours of the commercial activity.

CONCLUSION

The need for a warrant based on probable cause prior to an administrative inspection was clearly enunciated by this Court in the *Camara* and *See* decisions. Basically, the need for a warrant is the same as that necessary under the standard criminal law except that the showing for probable cause is viewed somewhat differently. As in the criminal law, exceptions to the need for a warrant in the administrative arena apply only in special, narrowly defined cases. The theory is that in both the administrative area and in the criminal law some flexibility within the constitution is necessary in order to balance public and individual interests. Significantly, warrantless inspections in this country have always been the exception rather than the rule.

Section 8(a) of OSHA would sweep away the need for a warrant for approximately five million diversified businesses in this country. The shoeshine boy on the corner stands with General Motors as far as OSHA is concerned. Surely, the Fourth Amendment to the United States Constitution cannot be subjected to such severe erosion.

We recognize that OSHA inspectors could proceed with their duties much more expeditiously if a warrant requirement was absent. This justification, however, has been used countless times in the past by law enforcement officers.

Traditionally, it has been rejected. Justifiable ends and convenience of enforcement are not themselves enough to permit warrantless searches. If the contrary were true, warrants would be found only in the past and our fourth amendment freedoms no longer would exist.

For the reasons set forth in this Brief, Amicus Curiae urge the Court to uphold the decision of the three-judge federal panel below.

DATED This 29th day of September, 1977.

Respectfully submitted,

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